

PROTECTING THE MARGINS: INTERSECTIONAL STRATEGIES TO PROTECTING GENDER OUTLAWS FROM WORKPLACE HARASSMENT

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ABSTRACT

Sexual harassment jurisprudence is predicated on heteronormative constructions of desire and power in the workplace. Harassment claims brought by gay and lesbian workers explode this binary gender paradigm by challenging the premise that desire can only flow between workers of different biological sexes. While courts have striven to integrate LGBT workers into existing anti-harassment legal regimes, the contortions made to achieve such integration expose the under-inclusiveness of sexual harassment doctrine in its current form. Workplace harassment on the basis of gender non-conformity, whether manifested as discrimination against gay workers, or against employees who refuse to adhere to norms of gender identity and performance, is largely unprotected under Title VII. Legislators have recognized that Title VII leaves these groups unprotected and have proposed new legislation, the Employment Non-Discrimination Act (ENDA), as a means to protect these groups. Legislators—and academics—have argued that ENDA will adequately address discrimination experienced by LGBT workers.

This paper provides a critique of the proposed Employment Non-Discrimination Act as a catch-all solution to curbing workplace discrimination against gender outlaws. It compares the similar analytical deficiencies of Title VII and ENDA, arguing that both laws strive to protect discrete classes of workers, rather than to dismantle discriminatory strategies employers deploy to maintain gender rigidity, and ultimately gender hierarchy, in the workplace. By excising sexual orientation from Title VII's prohibition on gender discrimination, ENDA proponents risk eliding the important point that LGBT identity is a manifestation of gender non-conformity. This paper argues that the enactment of ENDA is not enough; Title VII must expand and evolve to cover discrimination waged against all forms of gender non-conformity. A two-pronged Title VII and ENDA approach would preserve the critical connections between discrimination, discipline, and violence targeted towards workers who fail to adhere to the gender norms of the workplace.

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I.

INTRODUCTION

For most people, the term “sexual harassment” evokes a specific image: the victim is a heterosexual woman who is relatively powerless against her harasser, who is typically a heterosexual man with power, an unharnessed sexual drive, and crude instincts.¹ Using his position as leverage and motivated by sexual desire, the man proceeds to subject the female employee to harassment.

Despite this popular conception of sexual harassment, it is merely a sliver of the myriad forms of sexual harassment in the workplace; workers of all sexes, genders, and sexualities are vulnerable to and experience sexual harassment.² Moreover, sexual harassment frequently does not arise out of unharnessed sexual desire. At its core, sexual harassment in the workplace is a disciplinary use of

1. See, e.g., Joseph Goldstein, *Hotel Housekeeper Tells Magazine of Her Encounter With Strauss-Kahn*, N.Y. TIMES, July 24, 2011, at A14; Peter Baker, *Clinton Settles Paula Jones Lawsuit for \$850,000*, WASH. POST, Nov. 14, 1998, at A1; Anita Hill, *The Nature of the Beast*, MS. MAGAZINE (Spring 1992), <http://www.ms magazine.com/spring2002/hill.asp>.

2. See Katherine M. Franke, *What's Wrong With Sexual Harassment?* 49 STAN. L. REV. 691, 696–98 (1996–97) [hereinafter Franke, *What's Wrong with Sexual Harassment?*] (surveying three non-traditional sexual harassment cases).

force, a mechanism of aggression and violence that employers use to enforce rigid gender norms and relationships.³ While Title VII jurisprudence has been responsive to stereotypical, desire-driven notions of sexual harassment, it has failed to adequately address the more nuanced means by which employers enforce gender conformity and discipline gender non-conformity.

This paper will analyze workplace sexual harassment from a queer theoretical perspective, which embraces the fluidity of gendered performance in the public sphere.⁴ It will explore potential reforms to existing legal regimes that more effectively respond to the complicated realities of gender and sexuality in the workplace. Ultimately, this paper argues that recognizing fluidity in gender and sexuality is vital to achieving a paradigm shift in sexual harassment law to account for all forms and victims of harassment. This recognition disrupts Title VII's existing statutory framework, which confines protections to binary classifications of sex and sexuality. A queer paradigm of sexual harassment protection is critical to ensuring meaningful protection of all workers who are humiliated, punished, and abused for refusing to conform to traditional gender norms.

Part II of this paper will provide a brief genealogy of Title VII sexual harassment jurisprudence. Part III will explore critiques of the current jurisprudence posed by several queer theoretical scholars. Part IV will present queer alternatives to the current doctrinal framework. Part V will compare the advantages of implementing such alternatives through the pending Employment Non-Discrimination Act (ENDA) as opposed to continuing to litigate and innovate upon Title VII's existing sexual harassment jurisprudence. Finally, Part VI will explore current uses of Title VII to vindicate the rights of gender non-conforming workers.

Relying solely on ENDA to address the deficits in sexual harassment law is an under-inclusive strategy because in an ENDA regime, gender non-conforming workers who do not fit neatly into one of the LGBT categories would continue to be left at the margins of sexual harassment doctrine. Moreover, recent developments in agency law at the Equal Employment Opportunity Commission suggest that reforms in existing law could be more imminent than previously thought. These conditions create an optimal moment for reforming existing doctrine. Ultimately, I conclude that a multifaceted, intersectional approach to

3. See *id.* at 696 (“[S]exual harassment operates as a means of policing traditional gender norms particularly in the same-sex context when men who fail to live up to a societal norm of masculinity are punished by their male coworkers through sexual means. As a tool of sexism, sexual harassment can do its dirty work in either a different-sex or a same-sex context. Thus, the sexism in sexual harassment lies not in the fact that it is sexual, but in what it does as a disciplinary, constitutive, and punitive regulatory practice.”).

4. The queer theoretical perspective refers to the work of scholars who reject gender essentialism and binary classifications of sexual identity and embrace the fluidity of gendered performance in the public sphere. For an in-depth introduction to this perspective, see generally Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (2d ed. 1999), which is considered one of the founding texts of queer theory.

implementation of sexual harassment reform is necessary for both politically pragmatic and theoretically imperative reasons.

II.

THE GENEALOGY OF SEXUAL HARASSMENT LAW

The plain language of Title VII reads:

It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex.⁵

Sexual harassment law has developed through a series of common law cases that slowly expanded the boundaries of Title VII's statutory prohibition on sex segregation in the workplace.⁶ The cases have been the primary source of Title VII's development largely because Congress provided little detail as to what it meant when it prohibited discrimination "because of [an individual's] sex." In fact, the legislative history surrounding the prohibition on sex discrimination indicates that lawmakers included the prohibition as a means to prevent Title VII's passage.⁷ Tracing the evolution of sexual harassment jurisprudence illuminates the fluidity of Title VII and its potential to continue challenging workplace norms as a legitimate site of gender construction and reinforcement of gender identities, particularly for LGBT workers.⁸

The language prohibiting exclusion "because of sex" became the most litigated—and confounding—clause of the statute in workplace discrimination cases. Initially, courts interpreted the statutory language as prohibiting overt and concerted attempts to exclude women from the workplace. Over time, the Supreme Court and lower courts considered cases in which plaintiffs claimed that they were not overtly excluded from the workplace but were "othered"⁹ in a

5. 42 U.S.C. § 2000e-2(a) (2006).

6. See Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813 (2002) [hereinafter MacKinnon, *The Logic of Experience*] (citing *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Harris v. Forklife Systems*, 510 U.S. 17 (1993)).

7. See Michelle Ridgeway Peirce, *Sexual Harassment and Title VII—A Better Solution*, 30 B.C. L. REV. 1071, 1071 (1989) (citing 110 CONG. REC. 2577 (daily ed. March 30, 1965)).

8. See *infra* Parts V.B–VII.

9. See SIMONE DE BEAUVOIR, *THE SECOND SEX* xxv (1976) (arguing that only in casting women as "other" were men able to define their masculinity and establish dominance, stating: "men profit in many more subtle ways from the otherness, the alterity of woman. Here is a

manner that constructively excluded them.¹⁰ These employees “performed” gender¹¹ in a manner that was aberrant: their behavior did not comply with gendered expectations of dress, makeup, language, decorum, and sexual availability.¹² Employers policed gender conformity, often conflating it with a legitimate marker of job qualification and requiring employees to present themselves and behave in a certain way. When “gender outlaws”¹³ refused, employers accused them of lacking both professional and interpersonal skills and of being insubordinate.¹⁴ When these disputes led to litigation, courts slowly began to acknowledge that sex stereotyping in the workplace undermined Title VII’s statutory mandate.¹⁵

One of the first hints in Title VII jurisprudence that gender norming constitutes harassment appeared in *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). In *Barnes*, the D.C. Circuit Court of Appeals considered whether being sexually propositioned could constitute a sexual harassment claim under Title

miraculous balm for those afflicted with an inferiority complex, and indeed no one is more arrogant towards women, more aggressive or scornful, than the man who is anxious about his virility”).

10. See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (suggesting that plaintiffs may prove sex discrimination by “presenting evidence that the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender”).

11. See generally BUTLER, *supra* note 4 (defining gender as constitutive, a product of social discourse and repeated performance of culturally constructed roles).

12. See, e.g., *Desantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331–32 (9th Cir. 1979) (holding that Title VII did not prohibit employer from firing male employee for wearing earring); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326–27 (5th Cir. 1978) (holding Title VII did not prohibit discrimination in hiring process against man perceived to be “effeminate”); *Fagan v. Nat’l Cash Register Co.*, 481 F.2d 1115 (D.C. Cir. 1973) (finding that employer’s policy requiring male employees to have certain hair length did not constitute sex discrimination within the meaning of Title VII); *Schmitz v. ING Sec., Futures & Options, Inc.*, 10 F. Supp. 2d 982 (N.D. Ill. 1998) (finding that an employer’s disapproval of an employee’s “suggestive dress and demeanor” did not constitute a violation of Title VII); *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006) (upholding a policy requiring women to wear makeup because the plaintiff failed to demonstrate the policy was motivated by sex stereotyping).

13. Gender outlaws are not simply individuals who do not meet rigid standards of traditional gender performance. Rather, they actively “transgress the bounds of gender.” See Valorie Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN’S L.J. 68, 117 (2002).

14. *Schmitz*, 10 F. Supp. 2d at 985 (describing that supervisor criticized female employees for “assertedly inappropriate attire,” where female employees wore short or sheer skirts); *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1099 (N.D. Ga. 1975) (stating that hiring manager made adverse recommendation for male job applicant who was too “effeminate.”); *Jespersen*, 444 F.3d at 1107 (explaining that grooming policy stated that employees “must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform” and violation of the policy by female employee who refused to wear makeup was justification for termination).

15. See *infra* notes 27–30 and accompanying text. See also *Miller v. New York*, 177 F. App’x. 195 (2d. Cir. 2006) (denying summary judgment motion by employer where employer attempted to “correct plaintiff’s failure to satisfy male gender norms”).

VII.¹⁶ The plaintiff claimed that she was fired for refusing to submit to sexual relations with her supervisor, who repeatedly invited her to join him for after-hours social engagements, made sexually explicit remarks to her, and suggested that "if she cooperated with him in a sexual affair, her employment status would be enhanced."¹⁷ The court found that, because "retention of her job was conditioned upon submission to sexual relations—an exaction which the supervisor would not have sought from any male,"¹⁸ the plaintiff had made a prima facie case of sex discrimination under Title VII.¹⁹ Thus, while the court's logic remained confined to a heterosexual understanding of harassment, it began to acknowledge sexual harassment as a form of gender discrimination and a violation of Title VII.

Catherine MacKinnon, one of the first legal scholars of sexual harassment law, describes this core insight as the court's recognition that "[i]f harassment is sexual, it is sex-based unless proven not to be."²⁰ In *Meritor Savings Bank v. Vinson*,²¹ the Supreme Court fully codified this principle from *Barnes*, stating that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."²² In *Vinson*, the plaintiff was subjected to sexual propositions and was forcibly raped by her supervisor.²³ The Court's interpretation that the harassment occurred "because of sex" suggests that the Court believed a male employee would not be similarly subjected to such harassment.²⁴ Thus, the Court's first iterations of sexual harassment law assumed binary sexual attraction.

The *Barnes* and *Vinson* opinions took the critical step of expanding Title VII's prohibition on sex discrimination to protect employees who experienced unwanted sexual advances. However, it framed this protection in a manner that would later impede the application of sexual harassment protections to gender non-conforming workers. The holdings assumed a heteronormative supervisor-employee relationship, with the vulnerable female as Title VII's prototypical victim.²⁵ The opinions' analyses operate on default rules of sexual conformity,

16. 561 F.2d at 989.

17. *Id.* at 985.

18. *Id.* at 989.

19. *Id.* at 990.

20. MacKinnon, *The Logic of Experience*, *supra* note 6, at 822 (noting also that it is obvious that "sex in the dual sense of biological sex and social gender is central in sex in the third sense of sexuality").

21. 477 U.S. 57 (1986).

22. *Id.* at 64 (alteration in original). See also MacKinnon, *The Logic of Experience*, *supra* note 6, at 824.

23. 477 U.S. at 60.

24. *Id.* at 64.

25. Similarly, the *Barnes* court articulated the plaintiff's case in binary terms, stating that "[b]ut for her womanhood from aught that appears, her participation in sexual activity would never have been solicited." 561 F.2d at 990. The court went on to distinguish sexual harassment by heterosexual or homosexual supervisors from harassment by bisexual supervisors, which might be directed at either gender: "In the case of the bisexual superior, the insistence upon sexual favors

which created a gray area that would later facilitate impunity in same-sex harassment cases.²⁶

To some extent, this binary conception of gender was challenged, albeit indirectly, by the Supreme Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1988), the next seminal case in the development of Title VII jurisprudence. In *Price Waterhouse*, a female plaintiff's supervisors denied her a promotion, a decision that the court held was partly due to the plaintiff's gender; in short, her appearance and behavior did not conform to her employer's expectations of how a woman "should" behave.²⁷ In formal evaluations of the plaintiff's job performance, superiors castigated her for being "macho" and "overly aggressive," and they suggested she "take a course in charm school."²⁸ In her concurrence, Justice O'Connor stated that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."²⁹ The court's holding ushered in a new era of more expansive Title VII analysis in which punitive actions against employees on the basis of outdated gender stereotypes became recognized as illegal and discriminatory.³⁰

While *Price Waterhouse* challenged binary constructions of gender performance, and *Vinson* acknowledged sexual harassment as a form of gender discrimination, neither opinion addressed the premise that sexual harassment stemmed from heterosexual sexual desire. The Supreme Court confronted this issue in *Sundowner Offshore Services v. Oncale*, 420 U.S. 228 (1988). In *Oncale*, male coworkers sexually humiliated and physically assaulted a male

would not constitute gender discrimination because it would apply to male and female employees alike." *Id.* Hence, the court suggested unidirectional attraction was a requirement for a sexual harassment claim.

26. See *infra* Part III.A for a discussion of the court's implicit acceptance of traditional gender binaries.

27. 490 U.S. at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

28. *Id.*

29. *Id.* at 251.

30. *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1039 (2010) (noting that even before *Price Waterhouse*, "courts had found sex specific impositions on women in customer service jobs such as this one illegal"); *Chadwick v. Wellpoint*, 561 F.3d 38, 44 (1st Cir. 2009) ("[T]he essence of Title VII in this context [caregiver discrimination] is that women have the right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities."). Courts later seized on the idea of sex stereotyping as discrimination to protect male non-gender conforming behavior as well. See *Smith v. City of Salem*, 378 F.3d 566, 574 (finding that "after *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.").

employee, who sued his employer under Title VII. The District Court granted summary judgment for the respondent, stating that “Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers,” and the Fifth Circuit affirmed.

The Supreme Court reversed and remanded the case for further proceedings. It held that “nothing in Title VII necessarily bars a claim of discrimination “because of . . . sex” merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.” The Court addressed the binary nature of sexual attraction, both affirming and qualifying its relevance in same sex harassment cases. Specifically, the decision described three distinct scenarios that constituted actionable same-sex sexual harassment in the workplace.³¹ First, plaintiffs could prove that harassers desired solely individuals of the plaintiff’s sex, and thus would not have harassed employees of the opposite sex.³² In other words, desire for members of the victim’s sex motivated the harassment, and thus the harasser acted “because of” the plaintiff’s sex. Second, plaintiffs could present evidence that harassers exhibited hostility towards members of a plaintiff’s own sex in the workplace, a hostility that did not necessarily stem from sexual desire.³³ Third, plaintiffs could show that employers treated men and women differently, regardless of the sex of the harasser.³⁴ Creating discrete situational categories of actionable harassment stifled further opportunities to innovate upon Title VII and address the unique abuses facing the LGBT community.

III.

QUEER CRITIQUES OF SEXUAL HARASSMENT LAW

To some degree, the three scenarios addressed in *Oncale* expanded Title VII’s protections to LGBT employees pursuing sexual harassment claims; lower courts could no longer prohibit suits from proceeding solely because the plaintiff and harasser(s) belonged to the same sex.³⁵ Nonetheless, the court’s ruling still left many gender outlaws unprotected from harassment in the workplace. The

31. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80–81 (1998). (“Because the challenged conduct typically involves explicit or implicit proposals of sexual activity, it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.”).

32. *Id.*

33. *Id.*

34. *Id.* See also *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1008 (7th Cir. 1999) (identifying the three scenarios in which *Oncale* asserts that same-sex harassment may be actionable).

35. See *infra* Part II.

ruling largely addressed discriminatory attitudes towards the presence of a certain sex in the workplace instead of focusing on harassment as a means of enforcing gender conformity.³⁶ Employers discriminate not only when they treat members of different sexes differently, but also when they treat members of the same sex differently based on how closely members of that sex adhere to their traditional gender roles.³⁷ Thus, *Oncale* fails to connect the sex stereotyping prohibitions of *Price Waterhouse* with the sexual harassment prohibitions of *Meritor*. In order to be actionable, harassment must either flow from sexual desire or be directed towards members of a biological sex as a class.³⁸ *Oncale* leaves individuals who are harassed as an extension of sex stereotyping—in other words, employees who are punished by their employers for being gender outlaws—unprotected.³⁹

A. Sexual Desire and Binary Constructions of Attraction

With respect to sexual desire as the basis for a sexual harassment claim, in some courts plaintiffs must “plead and prove” the sexual orientation of their same sex harasser to fulfill *Oncale*’s legal requirements.⁴⁰ This involves—and sometimes requires—placing defendants on the stand and interrogating them

36. See, e.g., Franke, *What’s Wrong with Sexual Harassment?*, *supra* note 2, at 696.

37. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1988).

38. Cf. *Wrightson v. Pizza Hut of America*, 99 F.3d 138, 142 (4th Cir. 1996) (explaining that same sex harassment could be actionable under Title VII if the harasser targets only members of his or her own sex, in which case they would still be discriminating “because of” the employee’s sex). This rationale mimics *Oncale*’s approach by requiring the harasser to target a gender as a group in order to make out a colorable sexual harassment claim. See also *McCown v. St. John’s Health Sys.*, 349 F.3d 540, 543 (8th Cir. 2003) (noting that *Oncale* gave workers “three evidentiary routes by which a same-sex plaintiff can show that the conduct was based on sex. First, a plaintiff can show that the conduct was motivated by sexual desire. Second, a plaintiff can show that the harasser was motivated by a general hostility to the presence of the same gender in the workplace. And third, a plaintiff may offer direct comparative evidence about how the harasser treated both males and females in a mixed-sex workplace.”).

39. See Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 68–69 (1995) (“[T]he world will not be safe for women in frilly pink dresses—they will not, for example, generally be as respected as either men or women in gray flannel suits—unless and until it is made safe for men in dresses as well.”).

40. See Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 453 (2000) (pointing out that some courts require plaintiffs to provide evidence of same-sex harasser’s homosexuality in order to prevail in a sexual harassment discrimination claim). See also *Smith v. Pefanis*, 652 F. Supp. 2d 1308, 1325–26 (N.D. Ga. 2009) (finding that where harasser’s homosexuality was “undisputed,” same-sex plaintiff had sufficiently demonstrated that discrimination was “because of sex”); *EEOC v. Family Dollar Stores, Inc.*, No. 06-CV-2569, 2008 WL 4098723, at *13 (N.D. Ga. Aug. 28, 2008) (stating that “[i]n order to establish a same-sex sexual harassment claim based on sexual desire, plaintiff must offer credible evidence of harasser’s homosexuality”); *English v. Pohanka of Chantilly, Inc.*, 190 F. Supp. 2d 833, 845–46 (E.D. Va. 2002) (finding that sexually offensive comments and touching only amounted to “juvenile provocation,” in part because the plaintiff did not produce evidence that the perpetrator was homosexual).

about their sexual histories in order to decipher their sexual preferences.⁴¹ Consequently, juries must make highly subjective determinations of defendants' sexual orientation in order to find in favor of the plaintiff.⁴² The credible evidence of homosexuality requirement in same-sex harassment cases demonstrates the entrenched heterosexism of sexual harassment doctrine. Whereas the heterosexuality of opposite sex harassers is assumed, the homosexuality of same sex harassers is contingent upon an often insurmountable evidentiary burden.⁴³ If all plaintiffs were required to demonstrate that a harasser desired members of their biological sex, then perhaps one could argue the evidentiary requirement was designed to ensure that an individual discriminated "because of" an employee's sex. However, when only one class of plaintiffs is forced to meet this requirement—plaintiffs whose harassers happen to belong to the same biological sex as them—courts reinforce the notion that in a paradigmatic sexual harassment scenario, "normal" workers would not desire, and therefore would not harass, a member of their own sex. *Oncale's* sexual desire paradigm produces an illogical loophole: harassers who desire members of both sexes escape liability because they are deemed not to have acted "because of" the sex of their victims.⁴⁴ The "equal opportunity harasser" loophole has been widely written about,⁴⁵ but perhaps most compellingly by constitutional

41. See Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay": Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE J.L. & FEMINISM, 155, 184–85 (1999) (critiquing Fourth Circuit's approach to same-sex harassment cases, which requires a preliminary showing of sexual desire towards members of the same sex).

42. See, e.g., *Tepperwien v. Entergy Nuclear Operations, Inc.*, 606 F. Supp. 2d 427, 440 (S.D.N.Y. 2009) (addressing whether credible evidence existed sufficient to raise genuine issue as to whether harassing officer acted out of sexual desire); *Smith v. Cnty. of Humboldt*, 240 F. Supp. 2d 1109, 1117 (N.D. Cal. 2003) (finding plaintiff to have failed to establish that alleged harassment occurred "because of sex" because she did not offer any support, other than speculation about lesbian fashion, for assertion that coworker was homosexual and motivated by sexual desire).

43. See Yoshino, *supra* note 40, at 450 ("The courts' reluctance to interpret ambiguous conduct as homoerotic rather than as homosocial is often carried to extremes; so long as the harasser has not openly admitted his homosexuality or bisexuality, courts work furiously to assign him a heterosexual identity.").

44. See *Holman v. Indiana*, 211 F.3d 399, 401 (7th Cir. 2000) (holding that harassment by male supervisor against both male and female plaintiffs was by nature not "because of" sex and therefore not actionable under Title VII); *Foss v. Circuit City Stores, Inc.*, 521 F. Supp. 2d 99, 109–10 (D. Me. 2007) (holding plaintiffs not to have claim where supervisor "did not treat men and women differently, but . . . created an environment that was generally obnoxious to both men and women"); *Landrau Romero v. Caribbean Rests., Inc.*, 14 F. Supp. 2d 185 (D.P.R. 1998) (finding male supervisor's lewd comments to male plaintiff not to be "because of [plaintiff's] gender" given that supervisor engaged in "boorish behavior in front of both male and female employees" alike).

45. See generally Robin Applebaum, *The "Undifferentiating Libido": A Need for Federal Legislation to Prohibit Sexual Harassment by a Bisexual Sexual Harasser*, 14 HOFSTRA LAB. L.J. 601 (1997); Shylah Miles, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 WASH. L. REV. 603 (2001); Kyle F. Mothershead, *How the "Equal Opportunity" Sexual Harasser Discriminates On the Basis of Gender Under Title VII*, 55

scholar Kenji Yoshino, who describes how the loophole created by the sexual desire paradigm has forced the bisexual identity into visibility. In many ways, the bisexual harasser, better than any other workplace actor, challenges the binary and essentialist categories produced by sexual harassment law. Only through the “erasure” of the bisexual identity can *Oncale*’s desire framework remain intact.⁴⁶ Bisexual harassers de-stabilize the foundation of sexual harassment jurisprudence, which holds that sexual advances are the product of sexual desires, and sexual desire is biologically channeled towards members of a single sex.

B. Hostile Work Environments: Sex Based Animus v. Gender Streamlining

Oncale also held that sexual harassment is actionable if a plaintiff can demonstrate his or her employer’s “general hostility to the presence” of workers of the same sex in their workplace.⁴⁷ Unlike the sexual desire paradigm, bullying of a non-sexual nature can qualify as harassment if it targets members of one sex with the aim of driving them, as a class, out of the workplace. Prior to *Oncale*, many courts did not find sexual harassment when an *individual* plaintiff was bullied in a sexualized manner if other members of the plaintiff’s sex did not experience similar sexualized bullying.⁴⁸ This reasoning enabled lower courts to minimize horrific acts of same-sex sexual violence and humiliation, describing them as horseplay, bullying, or harassment of a general nature that is not on the basis of sex.⁴⁹ Courts held that even when acts in the workplace were explicitly sexual and gendered in nature, they were not necessarily performed “because of” the victim’s sex, but simply because peers considered the victim to be “prudish,” an outsider, disliked, or so different as to be “other.”⁵⁰ There is little

VAND. L. REV. 1205 (2002).

46. Yoshino, *supra* note 40, at 442.

47. *See infra* note 31.

48. *See, e.g.,* *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 1191, 1194, 1197 (4th Cir. 1996) (denying plaintiff’s sexual harassment claim filed after he was poked in the anus with a broomstick, blindfolded on several occasions, subjected to simulated oral and sexual acts, and forced to his knees on several occasions, because absent evidence of sexual gratification, there was no evidence harassers were hostile to members of the plaintiff’s sex). *See also* *Collins v. Buechel Stone Corp.*, 390 F. Supp. 2d 810 (E.D. Wis. 2005) (denying plaintiff’s Title VII hostile work environment sex discrimination action based on allegations that male co-employees touched his crotch and buttocks, pulled down his shorts, and threw stones and mudballs at him while he was driving forklift, because the evidence did not sufficiently establish that gender was the motivating factor).

49. *See e.g.,* *McWilliams*, 72 F. 3d at 1194, 1197; *Collins*, 390 F. Supp. 2d 810.

50. *See McWilliams*, 72 F.3d at 196 (“We do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct alleged here (nor comparable female-on-female conduct) is considered to be ‘because of the [target’s] sex.’ Perhaps ‘because of’ the victim’s known or believed prudery, or shyness, or other form of vulnerability to sexually-focussed (sic) speech or conduct.”).

jurisprudence post-*Oncale* exploring what qualifies as “general hostility” sufficient to make out a same-sex harassment claim. However, on its face, *Oncale* neither addresses nor rejects the logic of the courts before it. Strictly interpreted, *Oncale* appears to rule that in order for claims regarding humiliating acts of sexual aggression against members of the same sex to prevail in court, the aggression must target a class of workers of the same sex. Consequently, the most vulnerable victims of sexualized bullying—individuals who are targeted precisely for being different—are left without a route to a viable same-sex harassment claim. This is particularly striking when compared to the likely success a plaintiff would have if such targeted sexualized bullying came from a member of the opposite sex; in other words, it is hard to believe that a female plaintiff would fail on a similar sexual harassment claim if, for example, she alleged that she was stripped down, her anus was penetrated, or her genitals were grabbed by a male co-worker or supervisor. In short, courts have not generally extended MacKinnon’s canon that “[i]f harassment is sexual, it is sex-based unless proven not to be” to the context of same sex harassment.⁵¹

Oncale’s analytical deficiency is that it overlooks the regulatory and disciplinary function of the act of harassing, which is to enforce gender norms and punish, via sex-based humiliation, workers who transgress established norms.⁵² As a result, many courts have rejected claims by workers who were bullied, sexually assaulted, and ridiculed for diverging from traditional gender expectations.⁵³ Like its predecessors, *Oncale* failed to squarely address the reality that many plaintiffs, and particularly plaintiffs who are targets of severe bullying by members of the same sex, are targeted precisely because they fail to conform to gender stereotypes in the workplace.⁵⁴ Women who engaged in horseplay as a survival tactic have been dismissed as “welcoming” sexual harassment and thereby have been unable to successfully establish a cause of action.⁵⁵ Men who were targeted by other men for being “girly,” sexually prudish, or otherwise transgressing norms of masculinity have failed to prevail on claims of sex discrimination “because of” their sex; they are not being targeted for *being* a man, but rather for not being “man enough.”⁵⁶

51. See MacKinnon, *The Logic of Experience*, *supra* note 6.

52. *Id.*

53. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1716–17 (1998) (enumerating the harassment suffered by several plaintiffs whose claims were rejected because the harassment was not “sexual in nature”).

54. See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (“Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants’ actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.”). See also *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 257 n.1 (1st Cir. 1999) (involving gay plaintiff whose co-workers told him they “did not want him near them because of aversion to his ‘kind’ or because they feared that he would give them AIDS”).

55. See Schultz, *supra* note 53, at 1730.

56. See, e.g., *Goluszek v. H.P. Smith*, 697 F. Supp. 1452, 1453 (N.D. Ill. 1988); *Polly v.*

C. Sex Stereotyping Harassment Claims: A Nascent Doctrine with Troubling Applications

Some courts have embraced a more expansive reading of *Oncale*; in these courts, harassment motivated by sex stereotyping is actionable under Title VII.⁵⁷ However, few plaintiffs in same sex harassment cases have prevailed under the sex stereotyping/sexual harassment hybrid theory, and many courts have not even considered it.⁵⁸ Few same-sex plaintiffs have succeeded under a sex stereotyping harassment claim because courts impose stringent burdens of proof on plaintiffs who must demonstrate they were harassed “because of” their failure to conform to gender stereotypes.⁵⁹ Because many plaintiffs suffer threats and epithets that are laced with homophobic animus, courts that have considered the sex stereotyping rationale for sexual harassment routinely find that plaintiffs did not sufficiently demonstrate they were harassed for being gender non-conforming rather than for being gay, lesbian, or bisexual.⁶⁰

This trend, while demonstrating that courts are open to gender policing harassment cases, misconstrues gender and sexual orientation as discrete and

Houston Lighting & Power Co., 825 F. Supp. 135, 138 (S.D. Tex. 1993).

57. See, e.g., *Nichols v. Azteca Rest. Enters. Inc.*, 256 F.3d 864, 875 (9th Cir. 2001) (determining that gender stereotyping of a male gay employee by his fellow male co-workers “constituted actionable harassment under . . . Title VII”); *Rene v. MGM Grand Hotel*, 305 F.3d 1061, 1068 (9th Cir. 2002) (Pregerson, J., concurring) (identifying plaintiff’s case as one “of actionable gender stereotyping harassment”).

58. See, e.g., *McCown v. St. John's Health Sys., Inc.*, 349 F.3d 540, 542–44 (8th Cir. 2003) (affirming the lower court’s ruling that although male supervisor’s alleged conduct towards male employee, including “grabbing employee by waist, chest and buttocks, grinding his genitals against employee’s buttocks in simulated intercourse, telling employee to ‘squeal like a pig, or a woman’ . . . [and] attempting to stick the handle of a shovel and a tape measure in [plaintiff’s] anus” was “inappropriate and vulgar,” employee did not show that such conduct was “because of sex”); *Klein v. McGowan*, 36 F. Supp. 2d 885, 889 (D. Minn. 1999) (holding that because the workplace was almost entirely male, coworker harassment over sixteen-year period did not constitute harassment based on sex sufficient to be actionable under Title VII).

59. Pamela Papish, *Homosexual Harassment or Heterosexual Horseplay? The False Dichotomy of Same-Sex Sexual Harassment Law*, 28 COLUM. HUM. RTS. L. REV. 201, 217 (1996).

60. See *Vickers v. Fairfield Medical Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (holding that “a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII” (citing *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) (holding that there was “no basis in the record to surmise that [plaintiff] behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation”); *Bianchi v. City of Philadelphia*, 183 F. Supp. 2d 736, 737–38 (E.D. Pa. 2002) (holding that plaintiff’s “unwavering persistence in presenting his complaint as one concerning his alleged sexuality, rather than one concerning his alleged failure to meet a masculine ideal, defeats his Title VII harassment claim”); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (explaining that plaintiff “did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave or that as a man he was treated differently than female co-workers. His claim was, pure and simple, that he was discriminated against because of his sexual orientation. No reasonable finder of fact could reach the conclusion that he was discriminated against because he was a man”).

bifurcated causes for discrimination, when in fact employers often discriminate against LGBT workers precisely because they refuse to conform to gendered scripts of heterosexual conformity. Courts that apply this strained reasoning fail to acknowledge that targeting a person for real or perceived non-conformity to heterosexuality is a form of punishment for gender non-conformity.⁶¹ Individuals who do not conform to heterosexual identity are gender outlaws as much as the straight masculine woman or the straight feminine man. Sexual preference is how some individuals subvert gender scripts,⁶² and harassment on the basis of sexual orientation is a form of disciplining workers back into those scripts.⁶³ In dividing harassment into discrete categories of gender conformity and sexual orientation, courts ignore how interwoven these categories are in the minds of harassers, who act “because of” workers’ refusal to abide by gender norms, whether through gender presentation, sexual preference, or both.⁶⁴

IV. OVERCOMING THE LIMITATIONS OF CURRENT SEXUAL HARASSMENT DOCTRINE

Theorists such as Katherine Franke, Vicki Schultz, and Mary Ann Case have proposed different methods of broadening current protection by creating a continuum between Title VII’s prohibition on sex stereotyping and sexual harassment law.⁶⁵ Franke has advocated for sexual harassment to be reconceptualized as the “technology of sexism,” deployed by employers to enforce masculine and feminine gender performance that corresponds to workers’ biological sex.⁶⁶ Schultz proposes disaggregating sex from sexual harassment; in other words, she proposes including all forms of workplace abuse and bullying designed to enforce traditional roles as sex-based harassment under sexual harassment law.⁶⁷ Schultz points out that courts often parse out sexual conduct from other forms of hostile behavior towards women, thereby obscuring the relevance of non-sexual bullying, abuse, and physical assault in hostile work environment sexual harassment cases.⁶⁸ Mary Ann Case suggests widening coverage of Title VII standing to gay and “effeminate” men as well as women because employers target all three groups due to their desire to drive out the

61. See Franke, *What’s Wrong with Sexual Harassment?*, *supra* note 2, at 691.

62. Andrew Gilden, *Towards a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 99 (2008) (“A societal regime of compulsory heterosexuality has often been cited as the primary means through which male and female gender roles are produced through the relational differentiation of bodies and social roles.”) (emphasis omitted).

63. See Papish, *supra* note 59, at 221.

64. *Id.*

65. See *infra* notes 66–69.

66. See Franke, *What’s Wrong with Sexual Harassment?*, *supra* note 2, at 691.

67. See Schultz, *supra* note 53, at 1686–87.

68. *Id.* at 1723

“taint of femininity” from the workplace.⁶⁹

These theories abandon the *Oncale* framework, which identifies “targets” of sexual harassment via their biological sex. Instead the theories deconstruct the sex dichotomy historically embedded in Title VII litigation and strengthen protections for workers who are disciplined for transgressing gender norms. Upon embracing gender policing and sex stereotyping harassment claims, courts must take one step further, as Case suggests, and collapse sexual orientation harassment into sex stereotyping claims.⁷⁰ Such a conceptual shift will provide LGBT workers with an opportunity to argue that homophobic harassment is but one manifestation of sex stereotyping, and as such is prohibited under *Price Waterhouse*.⁷¹ These core reforms to Title VII would provide protection not only to LGBT workers who transgress gender norms through their sexual preferences, but also to other gender non-conformists, such as androgynous workers, men who refuse to participate in machismo work cultures, “foul-mouthed”⁷² women, and transgender workers. In recognizing that harassment is crucial to enforcing sex stereotyping in the workplace,⁷³ courts can construct a more comprehensive and internally coherent Title VII jurisprudence.

V.

REACHING THE IDEAL:

IMPLEMENTATION STRATEGIES TO SEXUAL HARASSMENT REFORM

Interpreting Title VII to strike at the heart of employer policies that police gender conformity would have a revolutionary impact on the workplace. Employees could achieve gender equality by freely performing their authentic sexual and gender identities without ramifications in a key public space. However, implementing such reform is a daunting enterprise. Advocates must think through the implications of different methods of widening the ambit of Title VII’s prohibitions on gender discrimination. Failure to effectively strategize reform could lead to a political backlash and retrenchment of gender discrimination.

This portion of the paper will explore two potential routes to implementing these reforms to sexual harassment jurisprudence: (1) passage and implementation of ENDA and (2) broadening Title VII jurisprudence to protect gender non-conforming workers, including, but not limited to, LGBT workers.⁷⁴

69. See Case, *supra* note 39, at 7.

70. *Id.*

71. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1988).

72. See, e.g., Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 96 (1995) [hereinafter Franke, *The Central Mistake of Sex Discrimination Law*].

73. See Franke, *What’s Wrong with Sexual Harassment?*, *supra* note 2.

74. The groups on which I will focus my analysis are women and LGBT workers. I have chosen women because they fall most clearly into Title VII’s scope of protection, and their struggle for workplace recognition serves as an important example to emerging classes of gender

*A. ENDA as a Path Towards LGBT Harassment Protection:
Advantages of a Freestanding Statute to End LGBT Harassment*

The proposed but never enacted Employment Non-Discrimination Act (ENDA) states:

It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity; or

(2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation or gender identity.⁷⁵

In its current form, ENDA descends from the Equality Act of 1974 (the "Equality Act"), legislation introduced on the five-year anniversary of the Stonewall Rebellion in 1974.⁷⁶ Legislators first introduced ENDA to add sexual orientation to the list of protected classes covered by the 1964 Civil Rights Act.⁷⁷ In the 1990's, ENDA was introduced as an alternative path to LGBT workplace equality in the form of a freestanding statute "to prohibit discrimination on the basis of sexual orientation and gender identity."⁷⁸ With the exception of the 109th Congress, legislators have introduced ENDA to every Congress for the greater part of two decades.⁷⁹ Most recently, Representative Barney Frank sponsored ENDA in the House of Representatives as H.R. 1397

minorities. Further, the women's rights advocacy community has much to gain from, and arguably an obligation to ensure, the expansion of Title VII protections to gender non-conforming workers. I have chosen LGBT workers because as a class they contain gender non-conforming workers who have been explicitly and systematically denied protection by Title VII. I have also chosen LGBT workers because the LGBT advocacy community is at the forefront of ENDA lobbying and is the most visible and vocal political stakeholder in its passage.

75. H.R. 1397, 112th Cong. (2011).

76. See William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining "Because Of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 495 (2011); *Nondiscrimination Legislation Historical Narrative*, NATIONAL GAY AND LESBIAN TASK FORCE, <http://www.thetaskforce.org/issues/nondiscrimination/narrative>.

77. Sung, *supra* note 76, at 495 n.40.

78. H.R. 1397, 112th Cong. (2011).

79. See Michelle Garcia, *A Bipartisan Attempt at ENDA*, THE ADVOCATE (Mar. 29, 2011, 5:38PM), http://www.advocate.com/News/Daily_News/2011/04/14/A_Bipartisan_Attempt_at_ENDA.

and Senator Jeff Merkley introduced the bill to the Senate as S. 811.⁸⁰

ENDA is a legislative attempt to strike at the heart of the devastating, widespread effects of workplace discrimination on LGBT workers.⁸¹ In a General Social Survey conducted in 2008, forty-two percent of LGBT respondents reported some form of employment discrimination.⁸² In a survey conducted in 2011 by the National Center for Transgender Equality, ninety percent of transgender respondents reported some form of workplace discrimination.⁸³ An aggregated study conducted by the Williams Institute suggested that between seven and forty-one percent of LGBT workers experienced vandalism or physical or emotional abuse as a result of their sexual identity.⁸⁴ Moreover, between twelve and thirty percent of straight workers have witnessed discrimination and harassment against LGBT co-workers.⁸⁵ These statistics demonstrate that the workplace is not a safe place for LGBT employees. Discrimination and harassment also frustrate LGBT workers' ability to achieve economic mobility.⁸⁶ Gay and bisexual men earn ten to thirty-two percent less than their straight counterparts.⁸⁷ Respondents to the National Center for Transgender Equality's 2011 survey who lost their jobs due to bias associated with their gender identity experienced ruinous effects; they were four times more likely to become homeless and eighty-five percent more likely to be incarcerated than those surveyed who were not fired due to their transgender status.⁸⁸ Of all the respondents surveyed, forty-seven percent stated they had experienced an adverse job outcome due to being gender non-conforming or transgender.⁸⁹

80. *Id.*

81. See S. 811, 112th Cong. (2011) ("The purposes of this Act are—(1) to address the history and widespread pattern of discrimination on the basis of sexual orientation or gender identity by private sector employers and local, State, and Federal government employers; (2) to provide a comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation or gender identity, including meaningful and effective remedies for any such discrimination; and (3) to invoke congressional powers, including the powers to enforce the 14th Amendment to the Constitution, and to regulate interstate commerce and provide for the general welfare pursuant to section 8 of article I of the Constitution, in order to prohibit employment discrimination on the basis of sexual orientation or gender identity.").

82. *Test. on S.811, the Employment Non Discrimination Act of 2011 Before the U.S. S. Comm. on Health, Educ., Labor and Pensions*, 112 Cong. 1 (2011) (statement of M.V. Lee Badgett).

83. JAIME M. GRANT, LISA A. MOTTET AND JUSTIN TANIS, NAT'L CTR. FOR TRANSGENDER EQUALITY AND NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 56 (2011).

84. Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AM. PROGRESS (June 2, 2011), http://www.americanprogress.org/issues/2011/06/workplace_discrimination.html.

85. *Id.*

86. *Id.*

87. *Id.*

88. See Grant, *supra* note 83, at 66.

89. *Id.* at 53.

The benefits of ENDA for LGBT workers are clear. With its successful passage, employers could no longer refuse to hire, terminate, or discipline an employee due to overt homophobia.⁹⁰ Rather than attempting to fit sexual orientation into the “because of sex” category under Title VII, plaintiffs who are discharged or disciplined because of sexual orientation would have a freestanding cause of action.⁹¹ Furthermore, if gender identity is included as a protected class under ENDA, discrimination would be prohibited based on “gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”⁹² This language speaks directly to the issues of gender performance that the Supreme Court broached through *Price Waterhouse*, but which courts have rarely interpreted to include sexual orientation or gender identity.⁹³

Similar to Title VII, ENDA lacks explicit language banning sexual harassment on the basis of sexual orientation or gender identity.⁹⁴ While the proposed legislation states that employment discrimination is prohibited,⁹⁵ it neither specifically defines sexual harassment, nor specifically prohibits it. Thus, ENDA’s potential to combat sexual harassment against gender non-conforming workers is not in its statutory mandates, but in its potential to produce common law protections against sexual harassment that are as robust as those developed through Title VII jurisprudence. Given the deeply rooted societal acceptance of sexual harassment liability today (demonstrated most aptly through the proliferation of employer sexual harassment protection policies and liability insurance),⁹⁶ further development of sexual harassment policies for LGBT workers is promising.⁹⁷ ENDA and Title VII define adverse employment actions

90. See H.R. 1397, 112th Cong. (2011).

91. *Equality at Work: The Employment Non Discrimination Act: Hearing Before the S. Comm. On Health, Education, Labor, and Pensions* 112th Congress (2012) (statement of M.V. Lee Badgett, Research Dir. of the Williams Inst. for Sexual Orientation Law and Pub. Policy at UCLA and Dir. of the Ctr. for Pub. Policy and Admin. at the Univ. of Mass. Amherst.)

92. H.R. 2015, 110th Cong. § 3(a)(6) (2007).

93. See *supra* Part III.C.

94. *Id.*

95. See H.R. 1397, 112th Cong. (2011).

96. See Joanna Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 20 (2003) (“More than half of employers (sixty-two percent) provide sexual harassment prevention training, with larger organizations more likely to offer it than smaller ones. Most employers that offer training make it mandatory for their employees, especially supervisory personnel, and forty percent rely on legal counsel or outside consultants to conduct it. Every federal agency provides training, although only one-third make it mandatory for all employees.”).

97. M.V. Lee Badgett, *The Impact of Extending Sexual Orientation and Gender Identity Non-Discrimination Requirements to Federal Contractors*, WILLIAMS INST. 4 (Feb. 2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-EOImpact-Feb-20121.pdf> (60% of F1000 companies that are not federal contractors have sexual orientation anti-discrimination policies while 20% of F1000 companies that are not federal contractors have gender identity anti-discrimination policies).

in identical terms, and ENDA's prohibition of discrimination is similarly applied when employers act "because of" sexual orientation.⁹⁸ Given the parallel statutory language, it is likely that courts will apply a similar, if not identical, analysis to sexual harassment claims brought under ENDA by LGBT workers.⁹⁹

ENDA provides several practical benefits to moving towards broader and more inclusive protections against sexual harassment. First, it focuses squarely on the struggles of a discrete class of sexual minorities, rather than attempting to squeeze those minorities into the "because of sex" paradigm of Title VII.¹⁰⁰ From a strategic legal standpoint, this is a key advantage of ENDA's clear statutory prohibition.¹⁰¹ Integrating sexual preference and gender identity into Title VII protections would de-stabilize the current heteronormative binary constructed out of Title VII's "because of sex" jurisprudence. No longer could courts require plaintiffs to show that employers sought to target either women, as a class, or men, as a class, for abuse in the workplace. No longer could a court rely on an "either/or" analysis of sexual desire to determine whether a defendant harassed a worker "because of" their sex. No longer would a vacuum of protection exist for LGBT workers.¹⁰² With the introduction of sexual

98. See H.R. 1397, 112th Cong. § 4(a)(1) (2011) ("It shall be unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity.").

99. Compare *id.* at § 4(a) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity; or (2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation or gender identity."), with 42 U.S.C. § 2000e-2(a) (2006) ("It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

100. See H.R. 1397, 112th Cong. § (3)(a)(6) (2011) ("The term 'gender identity' means the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."); *id.* § (3)(a)(9) ("The term 'sexual orientation' means homosexuality, heterosexuality, or bisexuality.").

101. Of course, Title VII could similarly be amended to reflect the same prohibitory language. Because both genres of statutory reform would require similar political consensus, and would produce similar, if not identical, lines of judicial interpretation, the analysis of the passage of ENDA could apply to an amendment to Title VII. However, because ENDA, and not an amendment to Title VII, is the focus of current legislative advocacy efforts, ENDA will be the focus of analysis in this Section.

102. *Test. on S.811, the Employment Non Discrimination Act of 2011 Before the U.S. S. Comm. on Health, Educ., Labor and Pensions*, 112th Cong. 1 (2011) (statement of M.V. Lee Badgett).

orientation and gender identity, courts would have to examine much more thoroughly the impetus for harassing behavior. Consequently, courts are likely to see such an expansive reading of Title VII as a complete overhaul. Given judicial deference to precedent, courts are likely to be wary of initiating such a drastic restructuring of Title VII without legislative reform.

ENDA provides courts with a way to punish harassment without straining purported “logical” interpretations of Title VII. It would allow for a broader application of sexual harassment law under a new and distinct legislative framework. Rather than attempting to convince courts of the continuum between sex-based discrimination and discrimination against LGBT workers,¹⁰³ LGBT advocates could focus their energies on litigating under a statute that directly speaks to the realities facing their specific identity group. For example, instead of trying to squeeze epithets like “fag,” “trannie” and “dyke” into Title VII’s “because of sex” evidentiary framework, litigating under ENDA could enable a fuller jurisprudence around the psychic violence of these words to LGBT workers and the LGBT community as a whole. ENDA litigation could present a new frontier to raise public consciousness around the endemic and highly specified targeting of gay, lesbian, bisexual and transgender workers. In essence, litigators could speak in the “native language” of LGBT realities rather than trying to translate those realities into the more widely spoken language of sex-based discrimination, which historically has focused on the experiences of straight white women.¹⁰⁴

Conversely, and perhaps cynically, some advocates in the women’s movement may support cabining gender conformity discrimination to ENDA for precisely the same set of reasons. Some women’s rights advocates may worry that LGBT workers compromise their ability to succeed in advancing the more widely accepted legal rights of women.¹⁰⁵ Title VII litigators in search of the “model plaintiff” may feel ambivalent about representing transgender women,

103. See, e.g., Franke, *The Central Mistake of Sex Discrimination Law*, *supra* note 72, at 33–34 (discussing the difficulty of prevailing on Title VII claims which argue discrimination based on the plaintiff’s “masculine” or “feminine” attributes as opposed to the plaintiff’s biological male or female sex). See *supra* note 57 for cases where federal courts found Title VII violations applied to similar underlying facts, demonstrating mixed success in convincing courts that Title VII encompasses discrimination on the basis of sexual orientation.

104. See Joel Marrero-Otero, *What Does a Wise Latina Look Like? An Intersectional Analysis of Sonia Sotomayor’s Confirmation to the U.S. Supreme Court*, 30 CHICANO-LATINO L. REV. 177, 182 (2011) (“[I]n sex discrimination cases, the focus is on race- and class-privileged women.”).

105. For further elaboration of the feminist/queer activist divide, see Kathryn Abrams, *Elusive Coalitions: Reconsidering the Politics of Gender & Sexuality*, 57 UCLA L. Rev. 1135 (2010). Abrams describes fractures in feminist and queer theory, explaining that the feminist movement has historically focused on gender subordination and statist solutions, whereas queer theory has focused on gender normalization and liberating gender performance from state regulation. As a result, coalitions have been shaky over issues like Proposition 8, where feminists failed to connect the struggle of gay marriage to issues of women’s liberation in a politically powerful way.

lesbians and bi-sexual women, none of whom are clearly captured in either the statutory or common law framework of Title VII and who may be less sympathetic to juries. Feminists may fear a backlash towards these types of unpopular plaintiffs that would set back Title VII's advances by pushing its protections to the very edges of statutory construction, thus diluting the likelihood of success for plaintiffs with more conventional claims. While Title VII is founded on binary hetero-normative presumptions, it is a remarkably powerful tool for heterosexual women facing harassment in the workplace. Thus, from a pragmatist perspective, feminist legal advocates who primarily serve heterosexual women may support the creation of a separate set of anti-discrimination protections for queer women (and men).

B. Disadvantages of ENDA

While ENDA has some marked strategic advantages for both the LGBT community and women's rights advocates, certain practical barriers exist to achieving transformative change in sexual harassment doctrine via ENDA. Further, the strategic advantages outlined above pose major theoretical problems, which I will begin to address in this section and then expand upon more fully in my discussion of opting instead to use Title VII as the vehicle for transforming sexual harassment doctrine.

The most obvious practical barrier to ENDA as a means for sexual harassment reform is that it has not yet been passed into law, despite years of legislative advocacy. Thus, focusing on ENDA and the common law it might produce to advance sexual harassment protections may be premature. More fundamentally, even if ENDA as a whole passes, Congress may excise crucial language before voting on it; legislators may insist that gender identity be removed from the list of protected classes before they support the bill's passage.¹⁰⁶ If gender identity is not included in the final version of ENDA, the language noted above protecting individuals based on "gender-related identity, appearance, or mannerisms or other gender-related characteristics"¹⁰⁷ will be lost. This language carries the most potential to radically alter sexual harassment doctrine, by encompassing gender performance, rather than simply biological sex or sexual orientation. Without it, ENDA loses a great deal of its transformative potential to challenge sexual harassment as a mechanism of gender policing in the workplace.

In addition to the possibility of outside forces chipping away at ENDA's protections, the LGBT movement itself is divided as to whether transgender workers should be included or excluded as a protected class under ENDA.¹⁰⁸

106. Sung, *supra* note 76, at 506.

107. H.R. 1397, 112th Cong. § 3(a)(6) (2011).

108. See Kerry Eleveld, *Poll: 70% of LGBT Respondents Support Noninclusive ENDA*, THE ADVOCATE (Nov. 7, 2007, 1:00 AM), www.advocate.com/news/2007/11/11/07/poll-70-lgbt-respondents-support-noninclusive-enda.

Some LGB advocates believe that transgender and LGB workers are strange bedfellows and that ENDA should focus on the realities facing the LGB community.¹⁰⁹ These advocates argue that if transgender workers cannot be included in ENDA's protections, LGB advocates should nevertheless forge ahead and promote the bill's passage.¹¹⁰ There are striking parallels between the political reasoning of this contingent of the LGB movement and feminist legal advocates who promote, or at least permit, separation between the feminist and LGB agendas.¹¹¹ This thread of separatist logic, while politically attractive, has dangerous implications for both the feminist movement and the LGB movement, which will be discussed in further detail below.

The final, and most fundamental, critique of ENDA is its limited potential to envision a theory of sexual harassment that is significantly broader than Title VII. This is particularly true if ENDA passes without gender identity as a protected category. ENDA's statutory framework is identical to Title VII and, as such, holds similar limitations. ENDA liability rests on the same "because of" framework as Title VII, simply with the words "sexual orientation" substituted for "sex." ENDA presents an inverted Title VII logic: now, gay and lesbian workers must prove they were discriminated against "because of" sexual orientation. The ENDA plaintiff is just as limited as the Title VII plaintiff in his or her ability to connect sex stereotyping to sexual orientation animus. For example, a gay worker may not have a cause of action if he wasn't called a "fag," but rather a "pussy," or a "cunt" or some other epithet that is not clearly classifiable as "homophobic." One might respond to this critique by pointing out this plaintiff could then raise a cause of action under Title VII (if they reside in one of the jurisdictions that embrace sex stereotyping harassment claims). However, this critique ignores the rhetorical violence that comes with separating sexual orientation and gender identity claims from gender conformity claims. In bifurcating these categories, courts ignore the way that LGBT and gender non-conforming workers experience violence and discrimination. Much of the most egregious harassment does not occur "because of" sex stereotyping or sexual orientation. Harassment occurs because LGBT and gender non-conforming workers threaten their harassers, and force them to consider alternative ways of performing gender and sexuality.¹¹² With classifications come limitations; until sexual harassment is defined by what it does (police gender conformity) rather than who it affects (whether it be "masculine" women, "effeminate" men, or

109. See John Aravosis, *How Did the T Get In LGBT?*, SALON (Oct. 8, 2007, 4:10 AM), <http://www.salon.com/2007/10/08/lgbt/>.

110. *Id.*

111. Compare Sung, *supra* note 76, at 506 (noting the marginalization of transgender individuals in mainstream LGBT political discourse), with Abrams, *supra* note 105, at 1144 (noting a similar fracture between feminist and queer communities).

112. Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1432-33 (1992).

LGBT people), it will never achieve its full transformative potential.¹¹³

The limitations of existing categories of gender discrimination are most aptly demonstrated when considering workers who do not identify as LGBT, but who reside in the amorphous spaces of sexuality and gender identity. One example of this type of worker is a lesbian transgender woman. When this type of worker is harassed, is it “because of” her sexual orientation, her gender identity, or her refusal to conform to sex stereotypes? Conceivably, judges could argue on the one hand that the worker does not qualify for Title VII protection because she was targeted for being a lesbian, and on the other hand that the worker does not qualify for ENDA (without gender identity) protection because the worker was targeted for being a gender non-conforming biological male. Another example is a straight “effeminate” male who is accused of “acting” gay. If this worker is targeted not for being gay, but rather for “acting” gay, then he may not have a cause of action under either Title VII or ENDA. Under Title VII, the court could point to the homophobic nature of the epithets to absolve the employer of liability, since Title VII does not protect against harassment “because of” sexual orientation. Under ENDA (without gender identity), the employer could argue that harassers knew that the worker was heterosexual and thus he was not targeted for his “real or perceived sexual orientation.”¹¹⁴

In sum, ENDA provides new avenues for litigation on behalf of some gender non-conforming workers. If gender identity is included as a protected class, there is a possibility its definition could be generously construed to strike at the heart of gender conforming discipline in the workplace. However, ENDA is a precarious path to reform because of its political uncertainty and the possibility that gender identity will be struck from the statute. Further, ENDA shares some of the same structural deficiencies as Title VII, which will continue to make it an imperfect framework to address the root of sexual harassment in the workplace, thereby excluding workers who do not fit cleanly into ENDA’s protected class categories.

C. Title VII: Innovating on Current Precedent

Given the detailed critique of Title VII doctrine outlined above, it may seem counterintuitive to propose Title VII as a path forward to re-envisioning sexual harassment protections for gender non-conforming workers. However, using new, compelling plaintiffs, and presenting novel legal theories that originate in existing sexual harassment doctrine could revitalize and transform Title VII over time. This incremental reform is hardly unprecedented, as sexual harassment law itself is entirely a product of common law innovations to Title VII’s statutory

113. See Franke, *What’s Wrong with Sexual Harassment?*, *supra* note 2, at 693.

114. See Sung, *supra* note 76 (suggesting that in the interest of political expediency, “gender identity” may be removed from the protected categories in ENDA).

framework.¹¹⁵ More fundamentally, litigating on behalf of sexual minorities under Title VII keeps intact the crucial interconnection between gender and sexuality, and recognizes that sexual harassment against women, “effeminate” men, gay, lesbian, and transgender people is mutually constitutive, and violence against one group is violence against all.¹¹⁶ As discussed above, some courts have moved towards this model in embracing same sex harassment based on failure to conform to gender stereotypes as a colorable cause of action under Title VII sexual harassment jurisprudence.¹¹⁷ These cases provide reason to hope. Pushing judges ever closer to this understanding through persistent and creative litigation holds crucial promise for the advancement of both women and LGBT workers’ rights.

Title VII has proven to be a dynamic tool in advancing workplace protections for victims of sex-based discrimination.¹¹⁸ With these shifts, new groups of plaintiffs were able to use Title VII as a tool to vindicate equality rights and to alleviate ostracism, humiliation, and abuse. As Catherine MacKinnon aptly states:

In sexual harassment law, factual questions and common law processes brought dynamism to equality law because, while women had been largely excluded from equality law, they had hardly been excluded from inequality in life Once the foundational principle of equality between the sexes in relation to each other was made available, direct access of violated women to court processes accomplished more change than legislatures have, in general, mandated or produced.”¹¹⁹

Similarly, as litigators bring the stories of new groups of gender minorities to courts’ attention, doctrine can continue evolving to address persisting inequalities. As described above, particularly horrific cases of workplace violence against sexual minorities have been denied on summary judgment because judges have concluded that the violence did not occur “because of” the plaintiff’s sex.¹²⁰ However, the perversity of these decisions—particularly when

115. See MacKinnon, *The Logic of Experience*, *supra* note 6, at 815–16 (noting that sexual harassment law developed through the courts, not legislature involvement).

116. See Abrams, *supra* note 105, at 1146–47 (discussing the need for coalition building and movement solidarity between feminists and queer activists).

117. See, e.g., *Nichols v. Azteca Rest. Enters. Inc.*, 256 F.3d 864, 875 (9th Cir. 2001) (determining that gender stereotyping of a male gay employee by his fellow male co-workers “constituted actionable harassment under . . . Title VII”); *Rene v. MGM Grand Hotel*, 305 F.3d 1061, 1068 (9th Cir. 2002) (Pregerson, J., concurring) (identifying plaintiff’s case as one “of actionable gender stereotyping harassment”).

118. The genealogy provided in Part II of this paper demonstrates the remarkable shifts in courts’ application of Title VII to encompass new types of discriminatory behavior (moving from sex segregation to sexual harassment to sex stereotyping), and to new iterations of harassment (from heterosexual harassment to homosexual harassment to gender conformity harassment).

119. MacKinnon, *The Logic of Experience*, *supra* note 6, at 832.

120. See *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 1191, 1194, 1197 (4th Cir.

workers are violated in clearly gendered ways—is beginning to pave the way for judicial reform.¹²¹ If the feminist and LGBT advocacy communities seize these compelling stories of injustice, publicize them, and continue to bring them before courts, it is likely these plaintiffs will slowly meet the same success as their Title VII predecessors.¹²²

Moreover, for gender non-conforming workers, Title VII contains a sophisticated, organized historical movement backing its legitimacy¹²³ that has fostered wide acceptance of its protections by employers and courts alike.¹²⁴ Large feminist groups like Legal Momentum, the ACLU Women's Rights Project, the Feminist Majority Foundation, and National Organization for Women provide crucial litigation support and policy advocacy to LGBT advocates when they pursue more expansive, gender-fluid applications of existing Title VII protections.¹²⁵ Channeling the momentum of the feminist movement's successes and identifying sexual harassment reform as the next historical marker of gender equality has enormous political and strategic advantages for LGBT workers, as well as workers who do not identify as LGBT but who also desperately need greater protections.

Perhaps most importantly, the feminist movement has a great deal to gain from supporting gender non-conforming workers, both men and women, in revitalizing Title VII to better address their struggles. If feminists do not take an active leadership role in demanding more robust protections for LGBT workers, they will undermine their own goals and the transformative potential of a statute that has provided them with enormous advances in workplace equality. At the time of Title VII's passage, the first woman in male-dominated workplaces was viewed as a threat to traditional gender norms.¹²⁶ Her presence brought

1996); *Collins v. Buechel Stone Corp.*, 390 F. Supp. 2d 810, 815 (E.D. Wis. 2005).

121. See, e.g., *Nichols*, 256 F. 3d 864.

122. See, e.g., *Macy v. Holder*, EEOC Appeal No. 0120120821, Agency No. ATF-2011-00751 (Apr. 23, 2012).

123. See Carl Brauer, *Women Activists, Southern Conservatives and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. LEGAL HIST. 1, 37 (1983).

124. Courts' acceptance of Title VII is demonstrated through far-reaching judicial interpretations of its protections. See Ronald Turner, *Making Title VII Law and Policy: The Supreme Court's Sexual Harassment Jurisprudence*, 22 HOFSTRA LAB. & EMP. L.J. 575, 578 (2005) (arguing that "the [Supreme] court created a fundamental public value opposing workplace harassment"). Employers' acceptance of Title VII's place in the modern workplace is demonstrated through the plethora of anti-harassment policies and policy guidance that have emerged from Title VII cases.

125. For evidence of the prominence of these women's organizations, see *Highlights from NOW's Forty Fearless Years*, NAT'L ORG. FOR WOMEN, <http://www.now.org/history/timeline.html>. See also *History of Feminist Majority Foundation*, FEMINIST MAJORITY FOUNDATION, <http://www.feminist.org/welcome/chronology/timeline.asp>; *The History of the ACLU Women's Rights Project*, ACLU, http://www.aclu.org/files/FilesPDFs/wrp_history.pdf.

126. Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1336 (2012) (describing initial reactions to Title VII's prohibition on sex discrimination by business and policy leaders at an EEOC implementation conference held shortly after the law went into effect).

discomfort and confusion to hyper-masculine work environments, which in turn led to systematic exclusion from hiring, promotion, and professional advancement.¹²⁷ Rather than dismantle the gendered workplace norms that hindered adaptation to women's presence, employers sought to remove women themselves. Sexual harassment was a form of exclusion; employers sought to amplify women's awkwardness in the workplace or stifle their advancement within it through sexual overtures, explicit verbal comments, fondling, sexual assault, and even rape.¹²⁸

Title VII permitted women to overcome these systemic barriers. However, in interpreting Title VII, courts have stopped short of fully addressing the root gender dynamics that caused their exclusion in the first place. Over time, women's presence in the workplace has become equal to men's.¹²⁹ However, the transgender woman remains unprotected under the Title VII framework. This woman creates the same confused, discomfited state in coworkers and supervisors as the cisgendered woman when she first entered a male-dominated workplace. The transgender woman forces everyone in the workplace to confront binaries in gender identity every single day, and confronting that reality is simply too difficult for many.¹³⁰ Instead, peers choose to, at best, ignore and, at worst, ostracize the transgender worker. They conclude that "that type" of woman does not belong at work, and they subject her to the epithets and abuse that enable the maintenance of the gender hegemony that currently exists.¹³¹ This woman is as entitled as others not to be driven "kamikaze style into deeply . . . inhospitable environments."¹³²

Similarities are evident between these two women's situations, though they

127. See Franke, *The Central Mistake of Sex Discrimination Law*, *supra* note 72, at 94–95 (lamenting the shortcomings of Title VII because under the legal requirements for standing in sex discrimination cases brought pursuant to that Title, "if a particular employer demands, prefers, or rewards a certain kind of demeanor from its employees, demeanor that could be characterized as masculine in nature, and this condition of employment adversely affects both women and men who are not sufficiently masculine, only the women would have standing to allege a violation of Title VII. This problem of standing is a profoundly important one for equality jurisprudence. Yet, by relying so heavily upon Sisyphean Title VII litigation that propels lone women into deeply inhospitable, male-dominated workplaces kamikaze-style, we reaffirm, over and over again, the dominant paradigm of sex discrimination that elevates bodies over gender roles. Instead, Title VII should recognize the primacy of gender norms as the root of both sexual identity and sex discrimination, and thereby the law should prohibit all forms of normative gender stereotyping regardless of the biological sex of any of the parties involved.").

128. See generally CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (describing sexual harassment and other adverse treatments of women in the workplace).

129. See Burns & Krehely, *supra* note 84 ("[W]omen account for 47 percent of the labor force.").

130. See GRANT, *supra* note 83, at 2 (explaining 71% of transgender workers stated in a national survey that they tried to avoid being targeted at work by hiding their gender identity).

131. See Burns & Krehely, *supra* note 84.

132. See Franke, *The Central Mistake of Sex Discrimination Law*, *supra* note 72. Franke refers to the shortcomings of Title VII for protecting "feminine" men, and by logical extension, for protecting transgender women who fail to act in line with the gender norms for biological men.

are situated in different points in the historical narrative of gender discrimination. Comparing the plight of cisgendered women prior to Title VII's passage with the pervasive discrimination facing transgender women today clearly demonstrates that vindicating the rights of this new class of gender non-conforming workers is the next frontier of Title VII litigation. The realities they face at work are reminiscent of the struggles that the first middle-class, heterosexual women faced in the 1940's and 50's. Only through aggressively protecting the equal rights of the workers on the fringes of Title VII's protections—for whom the protections are the most needed—can the women's rights community ensure that the core principles of Title VII will continue to thrive. By actively defending the boundaries of Title VII jurisprudence from attack, feminists ensure that courts do not encroach on the more firmly established elements of Title VII's protections through legal reasoning that, taken to its logical conclusion, could roll back the protections that Title VII has created for women in the workplace.¹³³ In the context of sexual harassment, feminists must take an expansive view of Title VII's protective mandate to protect against its erosion. By bringing the radical, the subversive, and the "gender outlaw" into the fold of Title VII protections, the rights of all women become stronger, and gender equality becomes more deeply embedded in legal and social discourse.¹³⁴

In sum, Title VII has long served as a transformative vehicle for workplace equality, and it could continue to produce advances for new groups of gender minorities. Innovating on a long line of jurisprudence carries both benefits and disadvantages. A remaining challenge is overcoming judicial precedent—and dicta—that limits Title VII protections to discriminatory conduct against one biological sex. The advantages lie in the powerful resemblances between the experiences and struggles of Title VII's first female plaintiffs and the new gender outlaws of today's workplace. Moreover, Title VII is an evolutionary mandate, and must continually be reformed until it reflects the gender and sexuality dynamics that animate discriminatory behavior and facilitate gender-based violence at work. Neither LGBT workers—nor women's rights advocates—should give up on Title VII's radical promise.

VI.

RECENT DEVELOPMENTS IN TITLE VII'S APPLICATION TO LGBT WORKERS

Last year, the LGBT legal community realized some of Title VII's radical promise through securing a favorable EEOC ruling in *Macy v. Holder*.¹³⁵ Mia

133. For example, if courts succeed in characterizing highly sexualized bullying as non-actionable "horseplay" in the context of homophobic harassment, this reasoning could eventually be applied to situations where women are bullied by men and their experiences are reduced to "horseplay," even when the bullying involves sexual touching and physical assault.

134. See Abrams, *supra* note 105.

135. *Macy v. Holder*, EEOC Appeal No. 0120120821, Agency No. ATF-2011-00751 (Apr.

Macy, a highly trained transgender police detective, applied for a job at the Bureau for Alcohol, Tobacco, Firearms and Explosives.¹³⁶ The agency guaranteed Macy the job pending a background investigation. During the investigation, Macy, who had applied to the position as a man, disclosed to the contracting agency coordinating her hiring that she was undergoing a male to female transition.¹³⁷ Less than a week later, the contracting agency notified Macy that “due to federal budget restrictions,” the position was no longer available. However, Macy discovered soon after that another person had been hired for the job.¹³⁸ Macy filed an EEO complaint to the Bureau, which stated that “claims of gender identity stereotyping cannot be adjudicated in front of the EEOC.” Thus her claim could only be processed through the Department of Justice, which provided significantly less robust remedies for discrimination plaintiffs.¹³⁹

After a lengthy appeals process, the EEOC issued a decision in April 2013 stating that Title VII applied to gender identity discrimination.¹⁴⁰ The decision began with an explanation of how in *Price Waterhouse* the Supreme Court acknowledged that prohibited sex stereotyping under Title VII extended beyond discrimination solely based on biological sex.¹⁴¹ The ruling recognized many recent cases in which courts have held that discrimination on the basis of gender presentation constitutes sex discrimination.¹⁴² For the first time in agency history, the EEOC found that transgender discrimination could constitute a cause of action under Title VII’s sex discrimination prohibition.¹⁴³ The decision clarified that a cause of action is viable:

regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned . . . or because the employer simply does not like the person identifying as a transgender person.¹⁴⁴

The LGBT advocacy community hailed the decision as a watershed in employment justice for transgender workers.¹⁴⁵ For the first time, the EEOC formally acknowledged the common animus driving discrimination against both

23, 2012).

136. *Id.* at 1.

137. *Id.* at 2.

138. *Id.*

139. *Id.* at 3.

140. *Id.* at 7.

141. *Id.* at 5–7.

142. *Id.* at 7 (“[C]ourts have ‘widely recognized sex stereotyping theory as a valid method of establishing discrimination ‘on the basis of sex’ in many scenarios involving individuals who act or appear to act in gender non-conforming ways.”).

143. *Id.* (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)).

144. *Id.*

145. *See id.*

women like Ann Hopkins and women like Mia Macy. The National Center for Lesbian Rights issued a statement characterizing the victory as a “landmark ruling” for the transgender community.”¹⁴⁶ Similarly Joe Solomonese, the president of the Human Rights Campaign, issued public congratulations to the plaintiff and the Transgender Law Center, which represented her, noting that “transgender people are among the most vulnerable members of our community.”¹⁴⁷ Just a month after the ruling was issued, the National Center for Transgender Equality launched a “know your rights” guide for transgender workers which proclaimed “following the groundbreaking U.S. Equal Employment Opportunity Commission (EEOC) ruling . . . we now know that the EEOC will take seriously and work to resolve claims of anti-trans discrimination.”¹⁴⁸

Macy signaled a paradigm shift in agency thinking around the purpose and reach of Title VII in protecting the rights of gender non-conforming workers. The decision demonstrates how juridical narratives reaching back to cases like *Price Waterhouse* can anchor protections for newer and more vulnerable groups of gender outlaws in the workplace.¹⁴⁹ At the same time, the decision leaves many questions unanswered. For example, will federal judges adopt the same analysis of Title VII’s prohibitions on sex stereotyping as the EEOC? It is also unclear whether the EEOC’s analysis extends to sexual preference and orientation; in other words, whether discrimination against gay, lesbian and bisexual workers is similarly “disparate treatment ‘related to the sex of the victim.’”¹⁵⁰ Moreover, the opinion did not squarely address whether harassment against transgender workers would constitute a violation of Title VII in the same way as other adverse employment actions—in *Macy*’s case, a failure to hire her.

Given how quickly national gay and lesbian rights organizations commended the *Macy* decision, *Macy* could potentially re-vitalize the argument to include transgender workers under ENDA. If the EEOC chooses to include sexual orientation in *Macy*’s broadened application of discrimination “because of

146. *NCLR Applauds Federal Agency Ruling Protecting Transgender Workers*, NAT’L CTR. FOR LESBIAN RIGHTS (Apr. 2, 2012), http://www.ncirights.org/site/PageServer?pagename=press_2012_NCLR_Applauds_EEOC_Transgender_042412

147. Press Release, Human Rights Campaign, HRC Applauds Federal Agency Ruling Protecting Transgender Workers (Apr. 24, 2012), <http://www.hrc.org/press-releases/entry/hrc-applauds-federal-agency-ruling-protecting-transgender-workers>.

148. *NCTE Releases Trans Job Discrimination ‘Know Your Rights’ Guide*, NAT’L CTR FOR TRANSGENDER EQUAL. (May 30, 2012), <http://transgenderequality.wordpress.com/2012/05/30/ncte-releases-trans-job-discrimination-know-your-rights-guide/>.

149. *Macy v. Holder*, EEOC Appeal No. 0120120821, Agency No. ATF-2011-00751 (Apr. 23, 2012).

150. *Compare supra*, Part III.C, with *Macy v. Holder*, EEOC Appeal No. 0120120821, Agency No. ATF-2011-00751 (Apr. 23, 2012). To support the expansion of gender stereotyping claims, the *Macy* ruling cited several cases involving gay men who were discriminated against for effeminacy. It is, therefore, unclear whether workers could allege discrimination solely on the basis of their sexual orientation, without additionally alleging they “presented” in a manner that was interpreted as gender non-conforming by their employer.

sex,” that decision would stand in tension with *Oncale* and its progeny.¹⁵¹ At the same time, such a reading could significantly diminish the need for ENDA. At the very least, *Macy* demonstrates the continuing ability of advocates to piece together the more radical components of Title VII’s historical narrative for application and expansion to current gender injustices in the workplace.¹⁵² It also provides a new opportunity for the feminist community to join in solidifying Title VII’s transformative promise by collaborating in the litigation and advocacy that *Macy* is sure to produce.

VII. CONCLUSION

Sexual harassment law in the United States has come a long way. Blatant sexism, manifested in sexually motivated overtures or acts that create hostile work environments, is no longer lawful. Until recently, sexual harassment law only protected heterosexual harassment. Now, Title VII protects men and women alike from same-sex sexual harassment. However, the courts’ interpretation of what constitutes discrimination “because of sex”, most clearly articulated in *Oncale*, still leaves many groups unprotected from workplace abuse. In fact, *Oncale* fails to protect millions of workers who do not fit its articulated classifications or who literally transcend them.

Challenging this framework is a task that requires both pragmatism and foresight. Advocates must address the struggles of gender minorities as quickly and efficiently as possible while fostering the continued development of Title VII’s transformative capacity. ENDA is a landmark piece of legislation, which, if passed, will provide some level of legal relief to millions of LGB workers who are subjected to hate crimes, homophobia, and exclusion from the workplace. ENDA provides a new statutory mandate from which dynamic common law, responsive to the realities of LGB workers, can emerge. However, ENDA should not be viewed as a panacea to Title VII’s shortcomings. In fact, many of the most problematic elements of Title VII persist in ENDA’s statutory framework.

This is not to say that ENDA’s passage is not acutely necessary, nor that using ENDA as a mechanism to advance harassment protection is not advisable. Rather, it is to say that relying too heavily on ENDA as a means of protecting gender minorities threatens to dilute the collective power of diverse forces of workplace equality activism. Such an attenuation of activist agendas could encourage each group of gender outlaws—women, gays, lesbians, transgender people, and those who do not fall into any traditionally recognized category at all—to focus on their most pressing individual needs rather than the broader expanse of harms that emanate from gender-conformity policing. Thus, in tandem with efforts to pass and implement ENDA, LGBT advocates, feminists

151. See Axa and Zalesne, *supra* note 41, at 184–85.

152. See MacKinnon, *The Logic of Experience*, *supra* note 6, at 813. Cf. *Macy v. Holder*, EEOC Appeal No. 0120120821, Agency No. ATF-2011-00751 (Apr. 23, 2012).

and all marginalized workers, should continue to challenge, develop, and transform Title VII sexual harassment jurisprudence to reflect and protect the fluid, evolving, and intersectional gender identities that comprise today's workplace.

